



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI

CAUSE NO. 1394 OF 2013

SILAH KIPROP KOECH

CLAIMANT

v

ADVANCED INNOVATIONS LIMITED RESPONDENT

JUDGMENT

1. On 23 February 2011, Advanced Innovations Ltd (Respondent) offered silah Kiprop Koech (Claimant) employment as a Technician (Claimant was confirmed through a letter dated 13 July 2011).
2. The Claimant served the Respondent in the capacity of technician until 5 August 2013 when the Respondent issued to him a summary dismissal letter.
3. The Claimant was dissatisfied and on 29 August 2013 he instituted legal proceedings against the Respondent alleging unfair termination of employment and breach of contract.
4. In its Response, the Respondent contended that the summary dismissal of the Claimant was justifiable and fair.
5. On 7 June 2018, the Deputy Registrar fixed the Cause for hearing on 1 November 2018.
6. When the Cause was called out for hearing on the scheduled date, the Respondent and its advocate on record were absent.
7. On record was an affidavit of service attesting to service of hearing notice upon Alphonse Mutinda & Co. Advocates on 9 June 2018.
8. The Court having satisfied itself that a hearing notice was served allowed the hearing to proceed.
9. The Claimant gave sworn testimony and produced exhibits.
10. The Claimant filed his submissions on 22 November 2018 and the Court has considered the evidence and submissions.

Unfair termination of employment

Procedural fairness

11. In his testimony, the Claimant stated that on 22 July 2013, when he reported to work, a Manager with the Respondent instructed him to go the Human Resources Office wherein he was asked to explain how a slot machine had been tampered with on 20 July 2013 and that he gave verbal explanations after which he was suspended pending investigations until 5 August 2013.
12. According to the Claimant, on 30 July 2013 he was called to go pick a letter which he did on 5 August 2013 only to find that it was a letter dismissing him from work.
13. The Claimant stated that the dismissal was unfair because he was not issued with a *notice of termination of employment* or afforded an opportunity to make representations before the dismissal.
14. The Respondent did not appear at the hearing to interrogate the Claimant's testimony or lead its own evidence.
15. In terms of section 35 of the Employment Act, 2007, the Respondent should have issued a *written notice of termination of employment* to the Claimant and followed it up with a hearing as contemplated by section 41 of the Employment Act, 2007.

16. Without any evidence of compliance with sections 35 and 41 of the Employment Act, 2007, the Court is satisfied that the Claimant has met the threshold expected of him by section 47(5) of the Employment Act, 2007 and finds that the summary dismissal was unfair.

Substantive fairness

17. The Respondent did not appear at the hearing to discharge the burden imposed upon employers by sections 43, 45 and 47(5) of the Employment Act, 2007, and the Court therefore concludes that there was no substantive fairness in the dismissal of the Claimant.

18. For the unfair termination, the Court will award the Claimant the equivalent of 2 months gross wages as compensation, based on the 2 years of service, and 1 month pay in lieu of notice in terms of section 35(1)(c) of the Employment Act, 2007 (gross salary for July 2013 was Kshs 27,515/- while basic was Kshs 26,080/-).

Breach of contract

Earned wages

19. The Claimant sought Kshs 7,733/- on account of 7 days worked but did not disclose the particulars of the month and year. The head of claim was not proved.

20. The Claimant also sought Kshs 5,524/- being wages up to 5 August 2013.

21. Among the employment records filed in Court was the Claimant's pay slip for August 2013 showing he was paid for the month of August 2013. The Claimant signed in acknowledgment. Nothing therefore turns on this head of claim.

Gratuity

22. On account of gratuity, the Claimant sought Kshs 69,596/-.

23. The letter of employment did not provide for payment of gratuity, and if by gratuity the Claimant meant *service pay* by virtue of section 35(5) of the Employment Act, 2007, he would not be entitled to the same as his pay slips show he was contributing to the *National Social Security Fund*.

Conclusion and Orders

24. The Court finds and holds that the summary dismissal of the Claimant was unfair and awards him

(i) Compensation	Kshs 55,030/-
(ii) Pay in lieu of notice	Kshs 26,080/-
TOTAL	Kshs 81,110/-

25. Claimant to have costs.

Delivered, dated and signed in Nairobi on this 23rd day of November 2018.

Radido Stephen

Judge

Appearances

For Claimant Ms. Ogonjo instructed by Kemboy Law Advocates

For Respondent Alphonse Mutinda & Co. Advocates

Court Assistant Lindsey